



STATE OF INDIANA

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July 28, 2009

Lea Ellingwood
Indiana Gaming Commission
East Tower, Suite 1600
101 West Washington Street
Indianapolis, Indiana 46204

Re: Informal inquiry 09-INF-22 regarding the Indiana Gaming Commission

Dear Ms. Ellingwood:

This advisory opinion is in response to your informal inquiry dated July 8, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

You write regarding electronic mail communication and how it is characterized by the Open Door Law ("ODL") (Ind. Code 5-14-1.5). You inquire about electronic mail messages exchanged between two members of a three-member governing body. You ask whether there are circumstances under which those electronic mail messages or telephone conversations could constitute a meeting for the purposes of the ODL, assuming that the subject matter is related to public business and that in the conversations or exchanges official action is taking place.

You also inquire whether there are any types of decisions or actions that cannot be made by electronic mail or telephone when a majority of the members of a governing body are participating.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. I.C. § 5-14-1.5-3(a).

A “meeting” is a “gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). Here, you have asked me to assume the majority of the members of a governing body are taking official action upon public business during the telephone conversations or through the electronic mail messages. The question, then, is whether the conduct constitutes a gathering. In my opinion, it does not.

“Gathering” is not defined in the ODL. The statute provides the following, though, regarding participation by electronic or telephonic means:

A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, videoconferencing, or any other electronic means of communication:

(1) may not participate in final action taken at the meeting unless the member's participation is expressly authorized by statute; and

(2) may not be considered to be present at the meeting unless considering the member to be present at the meeting is expressly authorized by statute.

I.C. § 5-14-1.5-3(d).

Pursuant to this section, a member who is not physically present cannot be counted present. *Id.* In the scenario you have presented, there is no majority of the governing body physically present in one location. Where there is no majority gathered together in one location and because those participating by telephone or electronic mail cannot be counted present, the activity is not a gathering and as such does not constitute a meeting for the purposes of the ODL.

The Indiana Court of Appeals has held similarly, that “in order to have a meeting under the Open Door Law, a majority of the governing body must be present. . . without a majority present, no meeting occurs for the purpose of the Open Door Law.” *City of Gary v. McCrady*, 851 N.E.2d 359, 367 (Ind. Ct. App. 2006).

While it is not relevant here, the serial meeting provision of the ODL would affect this type of activity between members of a governing body with more than five members. The serial meeting provision provides that certain conversations may constitute a meeting:

Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

I.C. § 5-14-1.5-3.1(a).

This provision does not apply to the scenario about which you have inquired, but agencies should be mindful of the serial meeting provision when members of a governing body of six or more members engages in this type of activity. Even in the serial meeting provisions, though, electronic mail is specifically set apart as a type of communication that does not constitute a gathering.

Finally, you inquire whether there are any actions or decisions that cannot be made via telephone or electronic mail. To fully answer this question, it would be necessary to look at the statutes relating to the public business of the particular governing body. The ODL is a statute of general application, and some specific statutes pertaining to specific governing bodies will provide further detail regarding how certain actions are to be taken. As a general rule, though, it is my opinion the ODL identifies only one type of official action which may not be taken via telephone conversation or electronic mail: voting.

A final action must be taken at a meeting open to the public.

I.C. § 5-14-1.5-6.1(d).

"Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.

I.C. § 5-14-1.5-2(g).

Since the gatherings or conversations do not constitute a meeting, the governing body would not be able to take final action via electronic mail or telephone conversation. In response to your inquiry, it is my opinion the only action the governing body may not

take via telephone or electronic mail is a final action, absent a specific statute providing further requirements.

Please do not hesitate to contact me if I can provide further assistance.

Best regards,

A handwritten signature in black ink that reads "Heather Willis Neal". The signature is written in a cursive, flowing style.

Heather Willis Neal
Public Access Counselor